IN THE

Supreme Court of the United States

October Term, 1964.

No. 1332

NATIONAL MOLASSES COMPANY,

Petitioner,

v.

DAVID E. BEEBE, Administrator of the Estate of RICHARD C. KLINE, Deceased,

Respondent,

and

HIGHLAND TANK AND MANUFACTURING COMPANY

and

P. W. MOYER, individually and as the surviving partner of P. M. & P. W. MOYER

and

EASTERN STATES FARMERS EXCHANGE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No.

NATIONAL MOLASSES COMPANY,
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DAVID B. BEEBE, ADMINISTRATOR OF THE ESTATE OF RICHARD C. KLINE, DECEASED,
Respondent,

HIGHLAND TANK AND MANUFACTURING COMPANY

AND

P. W. MOYER, INDIVIDUALLY AND AS THE SURVIVING PARTNER OF F. M. & P. W. MOYER

AND

EASTERN STATES FARMERS EXCHANGE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, National Molasses Company, hereinafter referred to as "National", respectfully prays that a writ

of certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit entered on February 24, 1967 affirming the judgment of the United States District Court for the Eastern District of Pennsylvania and the Appeal docketed in the said Court of Appeals as No. 16097 and the Order of the Court of Appeals denying rehearing entered on March 27, 1967.

OPINIONS OF THE COURTS BELOW.

The Opinion of the United States District Court, dated June 17, 1966 is not reported in — Fed. Supp. — (*infra* p. 4A). The Court of Appeals for the Third Circuit filed an Opinion dated February 24, 1967 which is not recorded at — Fed. 2d. — (*infra* p. 16A).* The Court of Appeals for the Third Circuit did not file an Opinion denying the Petition for Rehearing by National.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 24, 1967 (*infra* p. 24A). The Order denying the Petition for Rehearing was entered on March 27, 1967 (*infra* p. 22A). The jurisdiction of this Court is invoked under the Constitution of the United States and 28 U. S. C. Sec. 1254(1).

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* Counsel for Petitioner has been advised by Judge Luongo's Office, the Trial Judge, that the opinion of the United States District Court dated June 17, 1966 will not be reported in the Federal Supplement (*infra* p. 4A). Petitioner has been further advised by the Clerk of the Court of Appeals for the Third Circuit that the Court is withholding the insertion of its opinion in the Federal Reporter 2d Series pending the present Appeal to this Honorable Court.

CONSTITUTIONAL PROVISIONS INVOLVED.

U. S. C. Constitution—Art. 3, Sec. 2, Cl. 1.

Article 3, Sec. 2, Cl. 1 of the United States Constitution reads, inter alia, as follows:

> "Sec. 2. The judicial power shall extend to all cases in Law and Equity arising under the Constitution, the law of the United States . . . between citizens of different States . . ."

U. S. C. Constitution Amendment VII—Civil Trial.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

QUESTIONS PRESENTED.

Question No. 1.

In a suit by a plaintiff in behalf of the estate of a decedent and the surviving spouse and allegedly dependent child under the Survival and Wrongful Death Act of Pennsylvania respectively in the Federal Courts where diversity of citizenship is alleged to be the basis of jurisdiction, is it not mandatory that the plaintiff clearly and concisely set forth the averment of diverse citizenship rather than residence and does he not have the burden of proving the same? Moreover, is it not mandatory for the District Court and every court of federal jurisdiction thereafter to inquire into the jurisdictional question sua sponte at any and every stage of the litigation, especially where the jurisdictional issue was raised in Petitioner's answer to the complaint and specifically brought to the attention of the Court below in the Petition for Rehearing?

Question No. 2.

Did not the decision of the learned Court below, affirming the judgment of the District Court, violate the mandate of this Court in failing to apply the substantive decisional and statutory law of the Commonwealth of Pennsylvania, which, if it had done so, would have precluded the respondent's case against the Petitioner from being submitted to the jury and/or would have resulted in an exoneration from liability of the Petitioner?

Question No. 3.

Is there not a flagrant decisional conflict between the circuits and within the Third Circuit regarding the application of substantive and procedural law to cases involving similar points of law demanding a rectification by this Honorable Court so as to provide a uniformity of application of these questions which in the interest of justice affect litigants on a national scale?

STATEMENT OF THE CASE.

Plaintiff attempted to institute a diversity suit against Highland Tank and Manufacturing Company, hereinafter called "Highland", P. W. Moyer, individually and as the surviving partner of F. M. & P. W. Moyer, hereinafter called "Moyer" and National Molasses Company, hereinafter called "National" under the Pennsylvania Wrongful Death and Survival Acts (15a-20a). However, he neither averred nor proved diversity of citizenship.

Highland joined the Plaintiff's decedent's employer, Eastern States Farmers Exchange, otherwise known as Agway, as a Third-Party Defendant and National cross-claimed against Eastern (36a).

Initially cross-claims were filed by the Defendants, inter se, but were subsequently withdrawn without prejudice (31a, 38a, 43a, 301a, 302a).

As will be revealed by the Plaintiff's Complaint (15a) (Respondent herein) after stating that he was the Administrator of the Estate of Richard C. Kline, Deceased, he averred he *resided* at 302 West Holly Avenue, Pitman, New Jersey. He never averred that he was a *citizen* of the State of New Jersey and never proved the same since he did not appear at trial of the issue. The deceased and the surviving spouse and children were residents of the State of Pennsylvania at the time the action was commenced and the Plaintiff averred that National was a Pennsylvania corpotion at the time suit was commenced. The Complaint was amended concerning a liability question but no change in the averment was made regarding residence or citizenship. See 20a.

Defendant-Petitioner, National, in its Answer (21a) raised the question inter alia of the Court's jurisdiction over the person and the subject matter and specifically demanded proof at the trial of the issue of the allegation of diversity and moreover, it never changed its position by stipulation,

formally or informally, consent, admission, waiver, estoppel, or conduct since and under the law would not be permitted to do so.[2]

At the close of the Plaintiff's case, the trial Judge granted Highland's and Moyer's motions for directed verdicts under F. R. C. P. 50(b) but denied a similar motion by National (401a).

The trial resumed as to *Plaintiff v. National* and *National v. Eastern* and a jury returned a verdict against National in the sum of $306,975.00 under the Wrongful Death Act and $72,000.00 under the Survival Act and a verdict in favor of National against Eastern in no monetary amount for such contribution as permitted by the law, later remitted to $300,000.00.

There was no explanation as to how, why, or under what circumstances the $300,000 figure was arrived at nor how it was to be allocated between the Plaintiff's two separate actions since it is agreed that pain and suffering is not an element of damage in the case at bar, especially where the evidence on future loss of wages was speculative, 302a and 303a. Moreover, both principal and interest must be completely dissipated or exhausted within decedent's life expectancy, *O'Connor v. United States*, 269 F. 2d 578, at 584.

Viewing Plaintiff-Respondent's evidence from the posture of verdict winner, these facts were developed which give him every reasonable inference:

Highland has been in the business of fabricating storage tanks since 1946. In 1955 it fabricated a molasses storage tank for Eastern for use at Eastern's York, Penn-

2. Several years after the litigation commenced and after the Statute of Limitations had run on both causes of action, Respondent-plaintiff abortively attempted to get a stipulation in his Pre Trial Memo concerning diversity of citizenship by alleging that the plaintiff-Respondent was a citizen and resident of New Jersey, but no defendant agreed to the request made, including the Petitioner herein, and no ruling was made on the subject by the District Court. Petitioner retained its original position of demanding proof of diversity of citizenship set forth in its original Answer which it did not need to amend and ignored the request in its Pre Trial Memo.

sylvania premises. It had manufactured approximately forty to fifty similar molasses storage tanks for Eastern (Luckenbill 89a, 156a).

Eastern, which was the employer of the Plaintiff's decedent at the time pertinent to this litigation, was at the time in the business of selling molasses and mixing it with various types of grains to be used by farmers for animal and poultry food (196a, 197a, 198a). Eastern had a separate division which supervised the construction and installation of its many storage tanks (403a, 404a) at their various locations as well as the handling of many other facets of its diverse business. It had chemists and engineers to conduct experiments in connection with its business and for consultation concerning the design, installation and cleaning of tanks storing the molasses used in its business.

The particular tank involved in this litigation which was located at the York Service Center was installed in concrete under the floor of one of its buildings. A metal plate in the floor had to be removed to gain access to the tank. The tank was approximately five and one-half feet in diameter and twenty-four feet long; it had an eighteen inch opening at the top, a two inch venting pipe and one or two three inch pipes (97a, 98a, 99a, 100a). It also had a removable filter screen (187a, 188a, 199a) which could be removed from the outside for cleaning purposes. The overall design for the tank was submitted to Highland, made by Eastern's engineers and chemists (403a, 405a) and constructed by Highland to meet these specifications (404a, 405a). Highland had built approximately thirty to forty other similar tanks for Eastern each according to specifications supplied by Eastern (403a, 405a). No accident such as the instant one occurred as the result of the storage of molasses or cleaning of tanks at these other locations.

In 1957 the York Center tank was cleaned for the first time. Eastern had informed its employees of the normal, safe procedure to be followed in cleaning the tank. The

employees cleaning the tank were to adopt the following procedures:

1. Remove the eighteen inch covering the evening before the cleaning;

2. Fill the tank with water and then pump it out;

3. Put a safety rope around the man entering the tank; and

4. Place a fan at the opening to blow air into the tank.

This procedure was virtually identical with the procedure recommended by Plaintiff's alleged expert, Mr. Bradley, who also stated he would use this procedure even if the tank had a self-contained venting system (313a, 316a, 317a). It was also developed by fireman Halpin that because the tank was below the floor level it was mandatory for anyone entering the tank to use a self-contained oxygen mask such as a Chemox readily available on the open market.

When this tank was cleaned in 1957 some of the suggested procedures were followed without any unusual result, as a matter of fact the man cleaning the tank, Mr. Holtzapple, remained in the tank for three to four hours with no ill effects whatsoever (229a, 181a). At the time in question the same product in relatively the same amount was in the tank as on the day of the fatal occurrence to Mr. Kline. Moreover, in 1957 the tank was aired over night, a fan was blowing air into it, the pump was on and the slush of the residue was being agitated and pumped out, whereas on August 16, 1960, when Messrs. Holtzapple and Kline were injured and the latter died, the safety procedures aforesaid were not utilized (235a, 236a).

It transpired that before Mr. Luckenbill, Manager of Eastern's York operation went on vacation in August of 1960 he gave his fellow supervisor, Mr. Chinault, vague verbal general instructions that the tank would have to be

cleaned (101a, 102a). No specific time was fixed for the commencement of the operation. There is a definite contradiction which is irreconcilable between Messrs. Chinault and Holtzapple concerning whether the cover of the eighteen inch opening, which Plaintiff's counsel and expert has designated as a manhole cover, was taken off the night before the so-called cleaning operation was to commence (234a, 181a) or on the morning when it was supposed to begin (195a, 196a). It is undisputed, however, in the Plaintiff's evidence that Mr. Holtzapple testified that on the morning when they were to begin to clean the tank at about 7 A. M., one hour before the normal 8 A. M. start, a bolt securing the cover to the opening which was unscrewed accidentally fell in the tank or was knocked in by the garden hose used to fill the tank with water before it was to be pumped out (221a, 222a). Nothing had to be done to retrieve this small bolt. However, Mr. Chinault, Eastern's supervisor, erroneously decided that the bolt would damage the expensive pumping machinery and ordered Mr. Holtzapple, a man five feet five or six inches and about one hundred fifty pounds, to go into the tank to retrieve the bolt (188a, 199a, 235a). Mr. Holtzapple was consciously concerned because he detected a strong odor which smelled like sulphur rather than molasses. He waited for approximately fifteen minutes before deciding to enter the tank (230a, 234a, 235a). He was afraid of the danger involved and that he might lose his life (239a). Notwithstanding this fact he was ordered to enter the tank by his supervisor, Mr. Chinault (235a, 230a, 231a). Mr. Holtzapple procured a wooden ladder from somewhere on the premises (222a) and entered the tank without any of the safety precautions being used (231a, 232a).

While he was in the tank someone suggested using the blower on the feed truck located at the platform nearby to blow fresh air into the tank but this was not done at this time but utilized subsequently (232a). Mr. Holtzapple was

on his hands and knees groping in the residue of the molasses for the bolt with his face about eighteen inches from the bottom of the tank. After some time he felt faint and attempted to come up the ladder and out of the tank. For some unaccountable fashion he became wedged and could not get out or be pulled out by his supervisors, Messrs. Stiffler and Chinault (177a, 178a).

Plaintiff's decedent, Mr. Kline, a trainee of Eastern for some six weeks, and a graduate of Penn State University and not assigned to the operation with which Messrs. Chinault and Holtzapple were engaged, came on the scene and became aware of the situation of Mr. Holtzapple in the tank (178a, 179a, 202a). It is unclear whether Mr. Holtzapple was conscious or unconscious while in the tank. He was conscious when fireman Halpin entered the tank twenty or more minutes later because he was vomiting and hollering for help (223a).

After the Plaintiff's decedent, Mr. Kline, was on the scene he was either sent or went voluntarily a distance of one hundred twenty-five yards for some rope (191a, 418a). He ran this distance and returned with a rope. Stanley May, another employee, tried to help Mr. Holtzapple and Mr. Kline by entering the tank with an ammonia mask but after feeling uncomfortable he came out (192a). Mr. Kline entered the tank in some undetermined fashion since the ladder had been removed after Mr. Holtzapple entered the tank. Within a matter of seconds he lost consciousness and was later found by a fireman lying face down in the molasses.

The fire department was called and arrived ten minutes later. The fireman found Mr. Holtzapple lying on his back vomiting and hollering for assistance, and Mr. Kline unconscious with his face partially covered by molasses. There was no rope in the tank until a fireman brought one down and used it to secure around each man as he was removed. Holtzapple after a period of convalescence recovered completely. Kline was dead within moments after

he entered the tank. The Death Certificate listed the cause of death as diffuse hemorrhagic pneumonitis from noxious fumes (Halpin 159a, 168a).

Following this fatal accident the tank was cleaned by an independent septic tank cleaning company which sterilized its instruments and siphoned off the material in question without anyone entering the tank and no one from Eastern has entered the tank to clean it since 1960. It is undisputed that there is no need to do so as the tank works properly by merely removing and cleaning the screen from the outside. Moreover, there has never been any proof of contamination by the failure to clean and there has been no change in the maintenance or design of the tank either before or after the accident. Apart from the fact that the tank can be cleaned efficiently and properly from the outside by siphoning the material off (Luckenbill 89a, 156a).

Following the time of the filing of post-trial Motions by National to vacate and set aside the judgments in favor of the Plaintiff under the Wrongful Death and Survival Acts and in favor of Respondents Highland and Moyer and from the refusal to grant a similar Motion by National at the end of the Plaintiff's case and at the end of the case in chief, the matter was briefed and orally argued following which the Learned District Court Judge dismissed all of National's Motions except as to excessiveness in which he required the remittitur aforesaid.

Following rendition of the judgment and dismissal of the Appeal, National took a timely appeal to the United States Court of Appeals for the Third Circuit which was briefed and orally argued and resulted in affirmance of the judgment of the District Court upon the Opinion of the Court of Appeals set forth *infra* p. 16A.

Following this, your Petitioner filed a Petition for Rehearing in which it set forth not only its original grounds for Appeal but additional ones and raised a question concerning the jurisdiction of the Court which had never been

inquired into by the Court of Appeals or the District Court theretofore even though such question was raised in the Petitioner's Answer. The matter was never discussed or covered in the Pretrial Conference or other conference. Despite the fact that the Plaintiff has the burden to conclusively establish jurisdiction and the Court should inquire into it sua sponte and that jurisdiction cannot be acquired nor created by waiver or estoppel, the Court of Appeals for the Third Circuit in violation of the Constitution, the Statutory laws of the United States and this Court's rulings did not even grant your Petitioner a rehearing on the question raised at this level in its Petition. The present Petition was then filed.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

First Point.

The District Court Lacked Jurisdiction ab Initio.

It is the duty of a federal court to determine a question of its jurisdiction sua sponte though not raised by either party. *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U. S. 563 (1939).

In the instant case, the plaintiff, who never testified, merely averred in his Complaint that he was a *resident* but not that he was a *citizen* of New Jersey. Moreover, when the Complaint was amended four years later no change or attempt was made to indicate or claim that the plaintiff was a citizen or domiciled in New Jersey which is mandatory to obtain jurisdiction in a federal court.

While artifically created diversity has been tolerated in federal courts, its semblance must be averred and proved. Here there was merely an abortive attempt to artifically create diversity in order to confer jurisdiction on the federal court for reasons best known to the plaintiff, however the jurisdictional issue is fatally defective because of the lack of proper averment and proof, both of which are crucial and essential and cannot be inferred.

The averment of residence is not the equivalent of an averment of citizenship for the purpose of jurisdiction in the United States Courts. *Texaco-City Service Pipeline Company v. Aetna Casualty and Surety Co.* (8 C. C. A. 1960), 283 F. 2d 144, 145. See also *Tadbury v. Dairyman's Co-op Assn.*, 110 F. Supp. 738 (D. C. Pa. 1954); *Fowler v. Baker* (D. C. Pa. 1940), 32 F. Supp. 783; *Clapp v. Sterns & Co.* (D. C. N. Y. 1964), 229 F. Supp. 305.

The plaintiff has the burden to show that the federal district court has jurisdiction which he has unquestionably

failed to do in this case. *Peterson System, Inc. v. Morgan,* 224 F. Supp. 957 (D. C. Pa. 1963); *Samuel Silvers v. Maryland Casualty Co.,* 239 F. 2d 865 (3 C. C. A. 1956).

The Court of Appeals for the Third Circuit held that the question of jurisdiction can be raised at any time and that it cannot be conferred by waiver or estoppel. *Samuel Silvers v. Maryland Casualty Co., supra.* See also *McShan v. Sherill,* 283 F. 2d 462 at 464 (9 C. C. A. 1960). Jurisdiction may not be conferred by consent and lack of jurisdiction of the subject matter cannot be waived by the parties or ignored by the court. *Pacific Nat. Ins. Co. v. Transport Ins. Co.,* 341 F. 2d 514 (1965), cert. denied, 381 U. S. 912, 85 Supreme Ct. 1536, 14 L. Ed. 2d 434.

Jurisdiction of the federal court under the Constitution and the laws of the United States must be disclosed on the face of the Complaint. This was not done in this case. See *Howard Johnson of Kingsport v. The City of Kingsport* (D. C. Tenn. 1963), 192 F. 2d 211. The rule is so stringent that the United States Courts are required to raise all questions of jurisdiction on their own Motions should the parties fail to do so, and applies with equal force to the lesser question of the presence or absence of jurisdictional amounts in what otherwise would be diversity cases. *Mission Insurance Co. v. Brown,* 207 F. Supp. 18 (1962); *Park Horn v. Adlib Associates Inc.,* 345 F. 2d 173 (1965).

The policy of the Statute covering jurisdiction in the United States District Court in diversity of citizenship cases, in accordance with the provisions of the United States Constitution, calls for strictissimi juris. See *Judicial Code 24(1), 28 U. S. C. A. 1331, et seq.; Thomson v. Gaskill,* 315 U. S. 442; *Gliden Co. v. Zdanok,* 370 U. S. 530, 8 L. Ed. 2d 671 (1962); *Republic of Iraq v. First Nat. Bk. of Chicago,* 382 U. S. 982 (1965), 15 L. Ed. 2d 556; *City of Indianapolis v. Chase Nat. Bk. of City of New York,* 314 U. S. 63.

It is to be noted that the cases interpreting the issue of jurisdiction hold that "Residence" and "citizenship" are

not the same thing for the purpose of federal diversity jurisdiction. *Mantin v. Broadcast Music, Inc.*, 244 F. 2d 204 (C. C. A. Cal. 1957). Cf. *Brown v. Fennell*, 155 F. Supp. 424 (D. C. Pa. 1957). However, "citizenship" and "domicile" are synonymous. *Pemberton v. Colonna*, 189 F. Supp. 430, aff'd 290 F. 2d 220 (D. C. Pa. 1960).

The perplexing problem as to when diversity must be determined has been resolved by judicial fiat. Cases hold that the time when diversity is determined is the date when suit is begun: *Julien v. Sarkes Tarzian, Inc.*, 352 F. 2d 845 (C. A. Ind. 1965); *Corabi v. Auto Racing, Inc.*, 264 F. 2d 784 (C. C. A. Pa. 1959); *McNello v. John B. Kelly, Inc.*, 283 F. 2d 96 (C. C. A. Pa. 1960).

Second Point.

The Lower Court and the District Court Violated This Court's Mandate to Apply the Law of the Locus of the Alleged Accident Which, in This Case, Is the Commonwealth of Pennsylvania, Which They Failed to Do.

The decision of the court below affirming the judgment of the District Court violates the mandate of this court in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64; *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 and *Guaranty Trust Co. of New York v. York*, 326 U. S. 99 because on every crucial issue of substantive law the District Court and the court below arbitrarily refused to apply the law of Pennsylvania which would have exonerated the Petitioner from liability to the Respondent and created a species of liability unknown in the Commonwealth of Pennsylvania and/or at common law. The violation of the substantive law was not only decisional law but statutory law as well. See Wrongful Death Act of Pennsylvania, the Survival Act and the Statutory Construction Act. Wrongful Death Act, April 15, 1851 P. L. 669 Sec. 19 as amended 12 P. S. 1601, Act of April 26, 1855 P. L. 309, Sec. 1, 12 P. S. 1602, June 7, 1911 P. L. 678 Sec. 1, and April 1, 1937 P. L. 196 Secs. 1, 2, 20, 22,

23, 35, 36, 45. Survival Act of Pa. 1949, April 18, P. L. 512, Article VI, Secs. 601-603, 20 P. S. 320, 603. Pennsylvania Statutory Construction Act, May 28, 1937, P. L. 1019, Sections 551 and 552.

We respectfully suggest that an examination of this record will establish that the Courts below have not applied the Pennsylvania decisions in reaching their judgments.

Negligence of itself does not create liability. Back of the negligent act or failure to act must be sought and found a duty to the person injured, the observance of which would have averted or avoided the injury. See *Kimble v. Mackintosh Hemphill Co.*, 359 Pa. 461 at 472.

Where, in the pronouncements by the appellate courts of Pennsylvania, do we find such a duty as was imposed upon National in this case to warn concerning certain properties of its product under certain circumstances of which it was completely unaware? It has been stated in a number of ways, but where, in this case is the orbit of duty devolving upon National to warn that by no stretch of the imagination could it possibly foresee the bizarre, careless, negligent and wanton actions of Eastern and its employees which were solely productive of the end result of the harm? This is not the foreseeable harm which is contemplated by the Pennsylvania decisions. See 494a-495a.

In *Irwin Sav. & Tr. Co. v. Penna. R. R. Co., applt.*, 349 Pa. 278 at 284, Mr. Justice Drew, quoting from *Pass. Ry. Co. v. Trich*, 117 Pa. 390, 399 said:

> ". . . . To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared."

An examination of this record before and after the fatal occurrence and an examination, we respectfully suggest, of all of the decisions extant in this entire country does not dis-

close any fatal occurrence similar to the instant one. If this conclusion is correct, in half a century of the storage of billions of gallons of molasses, how can it be said that National could foresee such an eventuality as took place herein? Ergo, if National could not in its experience have possibly foreseen the contingencies which, in combination with one another, produced the end result herein, then it must be exonerated from liability under the Pennsylvania law which we know must be applied in accordance with the mandate in *Erie R. R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938); *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U. S. 487; *Guaranty Trust Co. of New York v. York,* 326 U. S. 99, 65 S. Ct. 1464 (1945).

The Learned Court below very cogently recognized this in its Opinion (*infra* at Page 4) that if Eastern had appreciated the nature and extent of the danger, any warning by National would have been superfluous and National's failure to warn would not even have been a causa sine qua non. Cf. *Green v. Independent Oil Co.,* 1964, 414 Pa. 477, 201 A. 2d 207; *Kline v. Moyer,* 1937, 325 Pa. 357, 191 Atl. 43. See testimony of Prebluda, 497a, et seq., Stiffler, 401a, et seq.; Eastern Service Center Manual P 25-737a, which the Court below overlooked.

The Court below then goes on to say "But there is no evidence here that Eastern had such actual knowledge". With this statement we must humbly and respectfully take sharp issue. We challenge the propriety of this statement for the reason that the record conclusively reveals that Eastern had qualified chemists and engineers in its employ and, in fact, the decedent, as his high school, and university records printed in the appendix indicates, was a competent certified agricultural chemist. See Bradley, Cross 332 and 333a; See 19a printed in plaintiff's appendix at 77b.

The expert produced by the respondent, Mr. Bradley, stated unequivocally that it was common knowledge even to uncertified farmers that CO_2 emanated from the storage of molasses. Therefore, Eastern did have such knowledge.

Moreover, the record indicates that they were conducting experiments for the fermentation of molasses to produce CO_2. Thus, National's alleged failure to give its customer, Eastern, which was more expert than it, a warning which the Pennsylvania law does not require in non-dangerous chattels, instrumentalities or substances, would be a futile act. Neither the law nor equity has ever required in Pennsylvania the doing of a useless act. *Williams, et ux., aplnts. v. Barbaretta, et ux.,* 359 Pa. 488 and the cases therein.

In fact, in this case, the record will graphically reveal that the jury in its perplexity asked for another or supplementary charge by the Trial Court in order to equate the expertise of National and Eastern as suppliers. See 728a to 730a re jury's question and court's supplemental charge. After the additional charge the jury found that Eastern was guilty of negligence which was the proximate cause of the accident. Since the Trial Court had never in its original or supplementary charges instructed the jury on the subject of concurrent causes it cannot be reasonably inferred by this Court or the Courts below that the jury's finding of guilt on the part of Eastern was on any other basis than your petitioner suggests. Otherwise this Court, as did the Court below, indulges in speculation as to what went through the minds of the jury which this Court below has previously frowned upon in *Curtis v. A. Garcia y Cia,* 272 F. 2d 235 (C. C. A. 3rd 1959).

The affirmance of the decision below cannot rest upon *Green v. Independent Oil Co.* or *Kline v. Moyer, supra.*

We note with some degree of satisfaction that the Learned Court below at pages 4 and 5 of its Opinion suggests that National's failure to give its customer, Eastern, its superior knowledge *could* constitute one of the legally responsible causes of the accident and that Eastern's failure to discover the danger, if any, on its own and provide safeguards *may also* have been such negligence as would be a basis for imposing contribution on Eastern. We rhetorically ask why should this decision be permitted

to rest upon what can only in the English language be speculations or possibilities?

No one has ever said that these facts are the jury's conclusions and without interrogating them, how can it be said that these were the foundations of the jury's conclusions without asking the individual members of the panel?

We respectfully suggest that we cannot find a distinction between the instant situation and that envisioned by the Court below in *Wilson v. American Chain and Cable Company,* 364 F. 2d 558 (1966) and *Rodriguez v. Brunswick Corp.,* 364 F. 2d 282 (1966), where the Court reversed because of faulty instructions re intervening and superseding cause which the Trial Court in this case refused to even charge on.

Not only was the negligence of Eastern herein an intervening and superseding cause but the jury was left with no guideposts on the subject of either concurrent negligence or intervening and superseding cause when the Learned Trial Court specifically refused to charge on the subjects. This deprived National of due process and a true jury trial.

As we pointed out previously, there must be evidence direct or circumstantial upon which logically the fact finder's conclusion must be based. This means that the evidence presented by the plaintiff must be such that by reasoning from it without resort to prejudice or guesswork, the jury could reach the conclusion sought by the plaintiff. While it is true that the plaintiff did not have to prove with mathematical exactness that the accident could only have been caused in *one manner* to the exclusion of all other possibilities; he *must eliminate those other causes,* if any, *as were fairly suggested by the evidence. Marrazzo v. Scranton Nehi Bottling Co.,* 422 Pa. 518.

The Death Certificate, P14-735a, does not list Kline's cause of death as CO_2. Moreover his fellow employees, exposed to the same conditions, did not die or suffer serious injuries and neither Holtzapple nor May ever testified that they were overcome by CO_2 nor were there medical or hospital records offered to establish this.

Had this mandate of the Pennsylvania Supreme Court been followed in the determination of this issue, the case could never have been submitted to the jury because of the variety of possible and probable causes deducible from the competent evidence. These include, but are not limited to, construction and location of Eastern's tank, lack of proper equipment, supervision and instructions, etc.

We fail to see any requirement that National warn in this case particularly when the deposition of its Vice-President, Mr. Joseph Cohen, introduced in the record by the plaintiff indicates a complete lack of knowledge on National's part as to any dangerous propensities on the part of its product or any need for cleaning the storage tanks at any time in any particular way that would involve a situation such as did give rise to the fatality in this case. In Pennsylvania there is no distinction, as the Courts below believe, between actual knowledge and constructive notice in assessing liability and an examination of the Charge of the Court below readily discloses this. 705a. The same standard must be applied to Eastern.

No one has satisfactorily explained why the decedent could violate the orders of his superior and enter the tank knowing the danger involved where there was no necessity to do so, without accepting the hazard, *Lonzer v. Lehigh Valley R. R. Co.*, 196 Pa. 610. See testimony of Stiffler.

If the law of Pennsylvania is applied with regard to contributory negligence or assumption of risk as stated in *Dorofey, aplnt. v. Bethlehem Steel Co.*, 407 Pa. 288; *Druding v. Philadelphia*, 374 Pa. 202; *Middleton, aplnt. v. Glenn*, 393 Pa. 360; and *Kronk, aplnt. v. West Penn Power Co.*, 422 Pa. 458, the plaintiff cannot recover. To try to exculpate him from his obvious contributory negligence and assumption of risk under the doctrine of a rescue mission will bear close scrutiny. In any rescue mission there must be imminent danger and an opportunity for the rescuer to escape unharmed. Neither of these facts are present in this case. The Trial Court and the Court below errone-

ously applied the rescue doctrine. See *Cooper v. Reading R. R.*, 370 Pa. 192; *Valente v. Lindner*, 340 Pa. 508.

We respectfully suggest that in order to fasten liability on National in this case, a new species of liability has been created, without precedent, unknown at the common law and presently unknown under the statutory or decisional law of the Commonwealth of Pennsylvania. We cannot find anything but generalities which have been used to submit the liability of National to the jury or thereafter to support its verdict.

We are not dealing with a dangerous substance or dangerous instrumentality in this case on the subject of molasses which is not a manufactured product but which was merely imported and distributed by National, without change in form or substance or without adding anything.

In *Maize, admr. aplnt. v. Atlantic Ref. Co., aplnt.*, 352 Pa. 51 at Page 56, the Supreme Court of Pennsylvania stated:

> "This court has laid down the rule that anyone who is responsible for the existence of *any dangerous instrumentality or substance with which persons are likely to come in contact* must 'impose a measure of control that is adequate to the protection of human beings' from it." (Emphasis supplied.)

The court in *Maize, supra*, cited with approval *MacDougall v. Penna. Power & Light Co.*, 311 Pa. 387, and *Koelsch v. Phila. Co.*, 152 Pa. 355. In the latter case there were injuries resulting from the explosion of natural gas and in the former, injuries from contact with a fuse box. See also *McClaren, admrs. v. G. S. Robins*, 349 Mo. 653, wherein a plaintiff suffered injuries by being overcome by fumes from the use of carbon tetrachloride.

In *Maize* the court further commented that while no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say in general terms *that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken.*

This record reveals that the plaintiff has failed to prove by competent evidence that National had any reason to even suspect by its experience that a hazard existed as to human beings cleaning tanks when no such situation had ever come to its attention, directly or indirectly. How could it be expected to safeguard against a contingency about which it had no knowledge and could not have known by constructive notice as its only experience, as this record reveals, was that there was no need to clean the storage tanks and certainly not by a human being entering it under the circumstances. How then can a duty be imposed on National to warn or forewarn of something of which it was not cognizant? It could not have become aware through customary methods employed by itself or others in the trade or by text books, publications, trade journals or other media open to it. The reason National never had an injury or fatality was because it was not guilty like Eastern in the storage of its product.

In Pennsylvania the law is clear and unequivocal that where you have a dangerous substance you must label and warn. No such imposition has been placed on the substance molasses. Contact with molasses is not dangerous.

We know there is a duty to warn concerning the dangers inherent or lurking in high tension wires, dynamite, gasoline, wild beasts and things of that nature.

In *Maize v. Atlantic Ref. Co., supra,* it was held

> "The power of the court to mould or amend verdicts of juries is established by repeated decisions; Iven's Appeal, 33 Pa. St., 237; Haycock v. Greup, 57 Id. 438; Byrne v. Grossman, 65 Id. 310; Smith v. Meldien, 107 Id. 348. It was contended, however, that this power is confined to corrections made at the time the verdict is rendered. This is not the law."

And the court inquired rhetorically: "Must the court be forever chained to an error merely because the sun has gone down upon it?"

In this connection may we state parenthetically that the Supreme Court of Pennsylvania held in *Bohner, aplnt. v. Eastern Express, Inc.*, 405 Pa. 463 at 471 that no verdict entered contrary to the weight of the competent evidence can stand no matter how many trials must be granted to effectuate the ends of justice.

In *Smullin, applnt. v. Harenski*, 106 Pa. Super. 453, it was stated:

> "Where the intention of the jury is plain, the court may mold the verdict into form according to the requirements of the law."

It would indeed take a Solomon in this case to ascertain upon what basis the jury reached its verdict in favor of the plaintiffs against National and in favor of National against Eastern in the light of the original and supplemental charges. This is particularly true when you consider that the jury never even had a rudimentary charge on the subject of concurrent negligence or intervening and superseding cause and therefore presumably, without being cognizant of the legal implications of these factors, could not have taken them into consideration. Ergo, how can the Court below, and we respectfully state this, say that the jury dispensed in its second verdict with the principles of intervening and superseding cause and adopted concurrent causes to justify its findings when the jury, untrained in the law and uninstructed by the court, had not the slightest idea of the principles involved.

If a jury cannot speculate upon issues to reach its verdict, how, then, we respectfully inquire, can a trial jurist or an appellate court justify speculation on its part? The jury found Eastern an expert.

The Supreme Court of Pennsylvania has held that natural gas and oil constitute dangerous products or instrumentalities. See *Moidel v. Peoples Natural Gas Company*, 397 Pa. 121; *Pryor v. Chambersburg Oil & Gas Co.*,

376 Pa. 521; *Waschak v. Moffat,* 379 Pa. 441; *Meddock v. National Transit Company,* 105 Pa. Super. 553; *Conway v. Philadelphia Gas Works Company,* 336 Pa. 11. Even in these cases the Court has used the following language:

In *Meddock v. National Transit Company, supra,* the court said:

> "The burden was upon plaintiff to show negligence. The mere fact that oil was escaping did not create a prima facie liability upon the defendant . . ."

In *Conway v. Philadelphia Gas Works Company,* the court held: 336 Pa. 11

> "While a gas company is under a duty to exercise the highest degree of care in supplying the product to its customers, there can be no recovery in a case of this character unless there is clearly established some act of negligence on its part which results in injury to plaintiff. This is the rule of our cases and has often been repeated."

In *Waschak v. Moffat, supra,* the following language was used:

> "On the contrary, since the emission of gas was not caused by any act of defendants and arose merely from the normal customary use of their land without negligence, recklessness or ultrahazardous conduct it was wholly unintentional, and no liability may therefore be imposed on defendants."

Doyle v. Atlantic, 357 Pa. 92 holds that in making deliveries of gasoline, Atlantic was justified in assuming and acting upon the assumption that the facilities provided for the storage of the gasoline were safe and nonhazardous.

In *Fritch v. Atlantic,* 307 Pa. 71, the deliverer of gasoline is under no duty to inspect the storage facilities of the vendee. These principles should apply here and exculpate National.

So, even with dangerous subjects negligence has to be proven by a breach of a duty which is non-existent here. The only exception to the rule in Pennsylvania involves blasting operations as exemplified by *Federoff v. Harrison Construction Company,* 362 Pa. 181.

In *Cadillac Motor Car Co. v. Johnson,* 221 Fed. 801 it was stated that common usage of the business is a test of negligence but not a conclusive test. Where, in this record, has there been any departure from the customary conduct of the business in which National or its competitors was engaged and where is the evidence that any other supplier of molasses warned or was compelled to warn its customers? Moreover, what trade journal, text book, or other authority suggests this procedure?

It was held in *Bisson v. John B. Kelly, Inc., aplnt.* 314 Pa. 99, "The defendant breached a duty imposed by law, not a duty superimposed by contract."

We most respectfully challenge anyone to reveal statutory or decisional law imposing a duty on National which it breached in this case. The liability of National herein cannot be predicated upon the purpose for which its product was sold to Eastern. National had no duty and certainly no control, as the evidence reveals, over the manner in which its otherwise pure product was stored and the reason for so doing. To have imposed a duty on it to this effect when Eastern was in exclusive control of the premises and the product would be both unconscionable and unreasonable. Mr. Justice Cardozo recognized this in the ancient case of *MacPherson v. Buick Motor Co.,* 217 N. Y. 382.

The respondent in this case failed to prove his cause of action against National and the case should not have been submitted to the jury.

In *Cuthbert v. Philadelphia, aplnt.,* 417 Pa. 610 at 614 the court stated:

> "Nevertheless, it remains a principle so fundamental as to require no authority that the mere existence of negligence and the occurrence of injury are insufficient

to impose liability upon anyone. There remains to be proved the vitally important link of causation: Flagiello v. Crilly, 409 Pa. 389, 187 A. 2d 289 (1963): Harrison v. Pittsburgh, 353 Pa. 22, 44 A. 2d 273 (1945); Philadelphia & R. R. Co. v. Spearen, 47 Pa. 300 (1864); Drill v. Genetti, 200 Pa. Superior Ct. 471, 190 A. 2d 185 (1963); and, Hillelson v. Renner, 183 Pa. Superior Ct. 148, 130 A. 2d 212 (1957). And plaintiff has the burden of proving this link, that the defendant's negligence was the proximate cause of his injury: Cushey v. Plunkard, 413 Pa. 116, 196 A. 2d 295 (1964); Loeb v. Allegheny County, 394 Pa. 433, 147 A. 2d 336 (1959); or of proving evidence from which a reasonable inference arises, that the defendant's negligence was the proximate cause of the injury: Zilka v. Sanctis Construction, Inc., 409 Pa. 396, 186 A. 2d 897 (1962). On the other hand, it is not necessary that plaintiff prove with mathematical exactness that the accident could only have been caused in one manner to the exclusion of all other possibilities (Finney v. G. C. Murphy Co., 406 Pa. 555, 178 A. 2d 719 (1962), but he must eliminate those other causes, if any, as were fairly suggested by the evidence: Lescznski v. Pittsburgh Rys. Co., 409 Pa. 102, 185 A. 2d 538 (1962); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A. 2d 517 (1949); Stauffer v. Railway Express Agency, Inc., 355 Pa. 24, 47 A. 2d 817 (1946); Cohen v. Penn Fruit Co., 192 Pa. Superior Ct. 244, 159 A. 2d 558 (1960). *And it is the duty of the trial court to determine whether or not this requirement has been met in the first instance before the issue can be submitted to the jury: Idlette v. Tracey, supra.*" (Emphasis supplied.)

In *Palsgraf v. Long Island Railroad*, 248 N. Y. 339, 162 N. E. 99 (1928) Mr. Justice Cardozo said:

"The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; It is risk to

another or to others within the range of apprehension." See 494a-495a.

The reasoning in *Palsgraf, supra,* has been adopted in Pennsylvania in *Dahlstrom v. Shrum,* 368 Pa. 423 when it stated at Page 290:

> "The test of negligence is whether a wrongdoer could have anticipated and foreseen the likelihood of harm to the injured person." See *Lebeck v. Jarvis et al.,* 250 F. 2d 285.

By this standard, its own experience in the trade and elsewhere and the bizarre facts of the occurrence. National could not possibly have foreseen any harm to the decedent and should be exonerated.

What Mr. Justice Holmes, when a judge of the Supreme Court of Massachusetts, said in the case of *Com. v. Pierce,* 138 Mass. 165, s.c., 52 Am. Rep. 264, on the subject of negligence, is applicable to this case: "Knowledge of the dangerous character of a thing is only the equivalent of foresight of the way in which it will act. If the thing is generally supposed to be universally harmless, and only a specialist would foresee that in a given case it would do damage, a person who did not foresee it *and who had no warning would not be held liable for the harm* . . . .". (Emphasis supplied.) This language was adopted as the law of Pennsylvania in *Andrews, appellant v. Smith, et ux.,* 324 Pa. 455. No one can dispute that molasses, per se, is harmless. Contrast this with *Dunn v. Atlantic Refining Company, aplnt.,* 391 Pa. 65.

Since National's product was a safe one in contrast to the dangerous instrumentalities and substances heretofore suggested and since it had no control or the right to decide the manner or means of the storage facilities or any part of the conduct or procedures to maintain or clean the tanks, and since it had no notice of any dangers, it had every right to rely upon the assurance of safety through Eastern's performance of its mandatory duty to provide its employees

with a reasonably safe place to work. This is particularly true where, as the record will reveal, National was neither requested for advice nor made any representation concerning its product or the safety thereof and where neither Eastern nor its employees were misled or lulled into any false sense of security by a misrepresentation of safety by an otherwise dangerous instrumentality. *Robb v. Glylock Corporation,* 384 Pa. 209. Logic and common sense dictate that it would have been unnecessary for Eastern to seek advice from National since Eastern's manager, Mr. Luckenbill, admitted that Eastern had chemists and engineers in its organization with whom he could have consulted at all times during his managerial function at York. 142a, 143a. It must be borne in mind that National simply sold its product for human and animal consumption and it was admitted it was fit for this purpose. 148a. This discharged National's liability.

Former Mr. Justice Holmes in "The Common Law", page 145, says:

> "Most liabilities in tort . . . are founded on the infliction of harm which the defendant had a reasonable opportunity to avoid at the time of the acts or omissions which were its proximate cause."

How can it be said that National, which was never advised by Eastern that it would or had used a man to enter its storage tanks to clean the residue of molasses, have had a reasonable opportunity to avoid an alleged danger of which it was not cognizant and could not foresee? This is true where, as here, Eastern had exclusive control of the premises and the product and should have been made to come forward with the evidence. See *Kotal v. Goldberg,* 375 Pa. 297; *Miller v. Hickey,* 368 Pa. 317.

This is a classical example of why Eastern should have been compelled to come forward with the evidence to establish why it was not solely and exclusively at fault. No such burden was cast upon it by the court below. In this

connection we would like to point out the case of *Faulks, aplnt. v. Fischer,* 349 Pa. 485 at 487 where it was held:

> "The rule that an employer must warn his employee of any dangers to which he will be exposed is applicable only *if the employer himself has or should have knowledge of such dangers,* if the employee is ignorant thereof, and *if they are not the subject of common knowledge* or *patent to a person of his apparent intelligence and experience:* Wagner v. Jayne Chemical Co., 147 Pa. 475, 479, 23 A. 772, 773; Corcoran v. Wanamaker, 185 Pa. 496, 39 A. 1108; Purdy v. Westinghouse Electric & Manufacturing Co., 197 Pa. 257, 260, 47 A. 237, 238; Roszina v. Howard Gas Coal Co., 251 Pa. 298, 302, 96 A. 716, 717; Baumgartner v. Pennsylvania R. R. Co., 292 Pa. 106, 110, 111, 140 A. 622, 624; Rice v. Kring, 310 Pa. 550, 555, 165 A. 833, 835." (Emphasis supplied.)

By the foregoing standard, National must be exonerated as a matter of law if the law of Pennsylvania is applied.

It cannot be disputed that Eastern, which was engaged over a long period of time in purchasing and the storage of blackstrap molasses purchased not only from National but other sources as well, certainly must be presumed to be familiar with the dangers latent as well as patent ordinarily accompanying the business in which it is engaged, *Kane v. Federal Match Corpporation,* 5 Fed. Supp. 507, and when you further consider, as the unrebutted testimony of Dr. Prebluda reveals, it had chemists and engineers in its organiation and attended meetings on the subject matter of this litigation and engaged in experimental forced fermentation processes, it certainly was aware that under certain circumstances molasses would be subject to the emanation of CO_2 in storage under the conditions prevailing herein and could have prevented any harmful exposure to its employees. See Prebluda, N. T. 928 to 963 inclusive.

Third Point.

There is a Flagrant Decisional Conflict Between the Circuits and Within the Third Circuit Regarding the Application of Substantive and Procedural Law to Cases Involving Similar Points of Law Demanding a Rectification by This Honorable Court So as to Provide a Uniformity of Application of These Questions Which in the Interest of Justice Affect Litigants on a National Scale.

The issue of deduction of taxes to reach the proper net worth reduced to its present value was decided adverse to the Petitioner despite a recent case directly on point producing a conflict between the Circuits on an extremely important issue, national in scope. This Learned Court, despite its involvement in more important national and international issues, still, we respectfully suggest, should consider the issues herein since these are not isolated matters and it is important that there be uniformity so that a man does not win or lose on the East or West Coast because of the caprice of the jurist at the particular locale or because of his interpretation of what the law is or ought to be or his disagreement with a reported case on this point. See *O'Connor v. United States,* 269 F. 2d 578 and *Moffa v. Perkins Trucking Co.,* 200 F. Supp. 183 at 188, where it is stated:

> "We are also asked to decide whether income taxes should be taken from the deceased total salary before computing what part of his earnings would reasonably be expected to go to the benefit of his wife and child. We think that such a deduction should be made. It has been said that future taxes are too uncertain to admit of advanced computation. But is wholly unrealistic to suppose that, at any time within the limits of the years the deceased could reasonably have been expected to live, either the discontinuance or substantial reduction

of Federal Income Taxes would occur. The deceased, as a salaried employee, never had in his own hands the amount withheld from his earnings for Federal Income Tax purposes; and his wife and child could have no direct benefit from that part of his earnings. While mathematical certainty is not possible, any more than it is in a prognosis of life expectancy and future earnings, nevertheless, an estimate may be made based generally on current rates, from which there should be computed the future income of the deceased after payment of Federal Income Taxes rather than before. The compensatory nature of the right to damages under the Tort Claims Act requires such consideration of Federal Income Taxes; the plaintiff-appellee can recover only for losses sustained. There is also an implication that 'take home' pay is considered the proper basis of earnings on the issue of damages in Oklahoma. Magnolia Petroleum Co. v. Sutton, 1953, 208 Okl. 438, 257 F. 2d 307; Note, 'Wrongful Death and Survival Actions', 6 Okla. L. Rev. 384, 386 (1953)."

We respectfully request this Honorable Court to look at the legislative history of Rule 50(b) which was to replace a cumbersome procedure theretofore in effect and to look at the cases hereinafter cited revealing that other Circuits do not enforce a stringent rule that the motion under 50(b), which is merely to acquaint the court with the issues involved and why they should not be submitted to a jury, be enforced as was done in the instant case.

The denial of National's motion for judgment n.o.v. in this case renders the practice of law in the Federal Courts an obstacle course with booby traps more complex than ancient common law pleading and penalizes a litigant for the inadvertance or excusable neglect of counsel, such as here, regardless of the distractions which emanate from heated litigation.

The Supreme Court of Pennsylvania has seen fit even to scrap temporarily the law of stare decisis where justice required it even though it meant the abandonment of a long line of substantive law and to the same effect charitable defense. *Griffith v. United Air Lines, Inc.*, 416 Pa. 1.

It was held in *Pickering v. Corson*, C. C. A. Illinois, 1940, 108 F. 2d 546 that the presentation by a defendant at the close of the plaintiff's case of a formal written motion for a directed verdict accompanied with an oral statement of the precise ground therefor complied with these rules.

In *United States v. 363 Cases More or Less Mountain Valley Mineral Water, D. C. Arkansas* 1956, 143 F. Supp. 219, it was held, while it is better practice for a directed verdict to be in writing an oral statement of the grounds for the motion is sufficient. Moreover, even a motion for judgment as of non-suit which was made in accordance with North Carolina practice was treated as a motion for a directed verdict at the conclusion of the evidence. *Atlantic Greyhound Corporation v. McDonald*, C. C. A. North Carolina 1942, 125 F. 2d 839.

When you consider that a motion for new trial is independent of a motion for judgment notwithstanding the verdict and is governed by different principles, you wonder why National is not entitled to a new trial regardless of how stringently Rule 50(b) is interpreted in this case. See *Jackson v. Wilson Corporation*, 243 F. 2d 212. See 54a.

It is respectfully suggested that if this Honorable Court will examine the circumstances of this case and apply the rule laid down in *Woods v. National Life and Accident Insurance Co.*, C. A. Pa. 1965, 347 F. 2d 760, and *Sano v. Pennsylvania R. R. Co.*, 282 F. 2d 936, 938 C. A. 3rd 1960 where, by analogy, the court permitted the substitution of a motion other than under 50(b) to have the same effect, therefore, why should National be penalized in this case when it fulfilled the requirements of the rule. See *Myra Foundation v. U. S.*, 267 F. 2d 612 and Murphy letter to Judge Luongo, 809a.

It is puzzling why such emphasis is placed upon the niceties of making and renewing motions under 50(b) in the light of *Ackerholt v. National Savings & Trust Co.*, C. A. 1956, 244 F. 2d 760 which permits a directed verdict upon the opening statement of counsel.

It was held in *Meyonberg v. Pa. R. Co.*, C. C. A. New Jersey 1947, 165 F. 2d 50, that a motion for non-suit and judgment of non-suit would be treated as a motion for a directed verdict and judgment entered upon a directed verdict respectively in accordance with sub-division (a) of Rule 50.

It cannot be too strongly emphasized in this case that after National renewed its motion for a directed verdict at the conclusion of its case against the plaintiff, which the court below informed the jury was a separate and distinct trial from the action by National over against Eastern, it did not introduce any evidence and therefore did not waive its right to have the renewal of its motion decided. It was not until the plaintiff introduced rebuttal evidence, which is not within the contemplation of this rule, that National abortively attempted to offer sur rebuttal.

Rule 50(b), which does not even require the motion to be in writing, was adopted for the purpose of speeding litigation, advising the court and opposing counsel of the issues involved and preventing unnecessary retrials. It merely renders unnecessary a request for the reservation of a question of law or a formal reservation and in addition it regulates the time and manner of moving for direction and moving for judgment on the basis of refusal to direct. "'It adds nothing of substance to the rights of litigants heretofore existing through a more cumbersome procedure." *Montgomery Ward v. Duncan*, 311 U. S. 250; *Berry v. U. S.*, 312 U. S. 450.

CONCLUSION.

WHEREFORE, it is respectfully submitted this case merits the judgment of this Court and it is further respectfully suggested that unless this judgment is reversed the Constitutional provisions referred to herein may be ignored with impunity and there will be erosion of the mandates of this Court and the highest Appellate Tribunals of the various states to say nothing of the confusion and chaos resulting from a lack of uniformity.

Respectfully submitted,

JOSEPH J. MURPHY,
VINCENT C. VELDORALE,
THOMAS BYRNE, JR.,
MARK D. ALSPACH,
Counsel for Petitioner.

Appendix.

JUDGMENT OF THE U. S. DISTRICT COURT.

Before LUONGO, *J.*:

AND NOW, to wit: November 19th, 1965, in accordance with the Verdict, it is

ORDERED that Judgment be and is hereby entered in favor of Plaintiff, David B. Beebe, Administrator of the Estate of Richard C. Kline, Deceased, and against the Defendant National Molasses Company, on Plaintiff's Claim under the Pennsylvania Wrongful Death Act in the sum of Three Hundred Six Thousand Nine Hundred Seventy-Five and 00/100 ($306,975.00) Dollars, and on Plaintiff's Claim under the Pennsylvania Survival Act in the sum of Seventy Two Thousand Two Hundred and 00/100 ($72,-200.00) Dollars, together with costs, and it is

FURTHER ORDERED that Judgment be and is hereby entered in favor of National Molasses Company and against Eastern States Farmers Exchange for contribution as allowed by law, and

By agreement of the parties, the cross-claims of Highland Tank and Manufacturing Company, Paul W. Moyer, individually and as the surviving partner of F. M. and P. W. Moyer, and National Molasses Company, against each other, be and the same are hereby marked Withdrawn, and

The Court having granted the motions of Highland Tank and Manufacturing Company and Paul W. Moyer, Individually and as the surviving partner of F. M. and P. W. Moyer, for directed verdicts under Rule 50, it is

ORDERED that Judgment be and is hereby entered in favor of Highland Tank and Manufacturing Company and Paul W. Moyer, Individually and as the Surviving partner of F. M. and P. W. Moyer, and against the Plaintiff, David B. Beebe, Administrator of the Estate of Richard C. Kline, Deceased, and it is

FURTHER ORDERED that the Cross-Claim of Highland Tank and Manufacturing Company against Eastern States Farmers Exchange and the Third-Party Action of Paul W. Moyer, Individually and as the surviving partner of F. M. and P. W. Moyer, against Eastern States Farmers Exchange, be and the same are hereby Dismissed.

By THE COURT:

ATTEST:
/s/ P. J. GREENWOOD,
Deputy Clerk.

ORDER OF THE U. S. DISTRICT COURT.

AND Now, this 17th day of June, 1966, upon consideration of the Motions of National Molasses Company, it is ORDERED

1. The Motion to Set Aside Directed Verdict in Favor of Highland Tank & Manufacturing Company and P. W. Moyer, individually and as the surviving partner of F. M. & P. W. Moyer, is DENIED;

2. The Motion for Judgment N. O. V. is DENIED; and

3. The Motion for New Trial is DENIED, provided plaintiff shall, within thirty (30) days from the date hereof, file a remittitur of the amounts of the awards in excess of $300,750. Upon failure to file such remittitur within the time specified, the Motion for New Trial is GRANTED, limited to damages only.

/s/ ALFRED L. LUONGO, *J.*

OPINION OF THE U. S. DISTRICT COURT.

LUONGO, *J.* June 17, 1966.

Plaintiff's decedent lost his life while attempting to extricate a fellow employee from an underground molasses tank. The fellow employee had collapsed in the tank while preparing to clean it. Contending that decedent's death was the result of the negligence of others, plaintiff brought this action under the Pennsylvania Wrongful Death and the Survival Acts. He joined as defendants the National Molasses Company (National) which had supplied the molasses, the residue of which necessitated the cleaning operation; Highland Tank & Manufacturing Company (Highland), the maker of the tank in which the molasses had been stored; and P. W. Moyer, individually and as the surviving partner of F. M. & P. W. Moyer (Moyer), who had installed the tank some years before. Decedent's employer, Eastern States Farmers Exchange (Eastern) was joined as a third-party defendant. In addition, the original defendants filed cross-claims against each other seeking indemnity and/or contribution in the event that plaintiff secured a verdict against one or another of them.

At the conclusion of the plaintiff's case all the original defendants moved under Rule 50 for directed verdicts in their favor. *Prior* to the court's announcement of its rulings on those motions, all three defendants withdrew of record the cross-claims against each other. The court then granted the Rule 50 motions of Highland and Moyer but denied National's. The jury subsequently returned a verdict in favor of plaintiff and against National assessing the damages in the Wrongful Death action at $306,975 and the damages in the Survival action at $72,200. The jury also found in favor of National in the third-party proceeding against Eastern. Judgment has been entered in accordance with the verdicts. Before me now are several post trial motions.

I. Defendant National's Motion to Set Aside Directed Verdicts in Favor of Highland and Moyer.

It is quite apparent that the Federal Rules of Civil Procedure ". . . contain no provision under which a defendant can recover judgment against a co-defendant except by way of a cross-claim filed pursuant to Rule 13(g), . . ." *Ragland v. Swindell Dressler Corp.*, 186 F. Supp. 769, 770 (W. D. Pa. 1960); *Broadway & Ninety-Sixth St. Realty Corp. v. Loew's, Inc.*, 23 F. R. D. 9, 11-12 (S. D. N. Y. 1958). Since National withdrew its cross-claims against its co-defendants Moyer and Highland, it lost whatever standing it may have had to challenge the rulings directing verdicts in their favor. Its belated explanation that the agreement of the defendants to withdraw the cross-claims was merely to remove surplusage has no support in fact[1] or in law.

The motion of National to set aside the directed verdicts in favor of Highland and Moyer will be denied.

II. Motions of Defendant National for Judgment N. O. V. and/or New Trial.

A. *Motion for Judgment N. O. V.*

At the outset, plaintiff argues that any motion for judgment n.o.v. is precluded by National's failure to comply with Rule 50(a) of the Rules of Civil Procedure in that it did not move at the close of *all the evidence* for a directed verdict in its favor. The point is well taken. It is apparent from the trial record that although National moved for a directed verdict at the close of the plaintiff's case and again at the end of its own principal case, it failed to renew its motion again even though plaintiff offered additional evidence in rebuttal and National itself offered evidence in surrebuttal.

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1. Counsel for Moyer and for Highland categorically refuted that as the reason for the withdrawal of the cross claims.

> "The failure of the defendant to move for a directed verdict against the plaintiff . . . at the close of *all the evidence* foreclosed its right to raise . . . any issue as to the sufficiency of the evidence and also its right to move for judgment notwithstanding the verdict. . . . This Court and others have uniformly held that the introduction of evidence after the denial of a motion for directed verdict constitutes a waiver of the error, if any, in the denial unless the motion is renewed at the close of all the evidence." *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F. 2d 129, 132 (3d Cir. 1965). (Emphasis supplied.) See *Brandon v. Yale & Towne Mfg. Co.*, 220 F. Supp. 855 (E. D. Pa. 1963), *aff'd per curiam*, 342 F. 2d 519 (3d Cir. 1965).[2]

Although the motion for judgment n.o.v. must and will be denied because of this procedural deficiency, nevertheless I have considered National's motion for judgment n.o.v. and have concluded that it would, in any event, be denied on the merits.

The facts are these:

Sometime in the early morning of August 16, 1960, plaintiff's decedent, Richard C. Kline, reported to work at the Eastern States Farmers Exchange in York, Pennsylvania, where he had been employed as a management trainee for approximately two months. At the time of his arrival, preparations were already underway to clean an underground molasses storage tank situated on the premises. The cleaning operation had hardly begun when a fellow employee of Kline's, one Wayne Holtzapple, dropped a bolt into the tank. Fearing that the loose object

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2. In its brief National suggests that by submitting a point for binding instructions it satisfied its burden under Rule 50(a). "[T]he defendant would have us attribute to . . . its point for charge . . . the effect and import of a motion for a directed verdict under Fed. R. Civ. P. 50(a). This we cannot do. When a rule is so lucid in its language and emphatic in its conditions, it is beyond our power to relax its strictness without violating the Seventh Amendment." Brandon v. Yale & Towne Mfg. Co., supra, p. 861.

might somehow become lodged in a filter pump attached to the tank, Holtzapple descended into the tank to retrieve it. Shortly after his entry he collapsed. Seeing Holtzapple's predicament, Kline ran to another part of the premises, obtained a rope, returned with it and descended into the tank to attempt to remove Holtzapple. Almost immediately after descending into the tank, Kline collapsed. A third employee, Stanley May, also attempted to render aid, but had to be assisted from the tank when he had difficulty in breathing. The York Fire Department was summoned and both Kline and Holtzapple were removed, unconscious, from the tank. Holtzapple survived, but Kline did not. Plaintiff introduced testimony from duly qualified experts that death resulted from the inhalation of poisonous carbon dioxide gas which had been given off by the molasses stored in the tank.[3]

1. Duty of Suppliers Under Pennsylvania Law.

Defendant National does not seriously dispute the operative facts as recited above, rather, it argues that under the law of Pennsylvania those facts do not entitle plaintiff to relief. I cannot agree.

Under the law of Pennsylvania

". . . one who supplies a product to another and knows or should know that the foreseeable use is dan-

3. At trial plaintiff introduced Kline's death certificate which listed the cause of death as "diffuse acute hemorraghic pneumonitis." At oral argument on the pending motions defendant National contended that that finding is presumed to be the cause of death. That is not the law. Death certificates are "'. . . at best . . . only prima facie evidence of any fact therein stated and are open to explanation and contradiction by an oposing party.'" Castor v. Ruffing, 178 Pa. Super. 124, 128 (1955). In the instant case not only did plaintiff's experts testify that carbon dioxide poisoning caused Kline's death, but so did Dr. Prebluda, defendant's expert. In addition, Dr. Aaronson, who was called by plaintiff, noted that although the cause of death as listed on the death certificate was not technically meaningful to him as a physician, he believed it to be consistent with his own expert opinion as to how Kline died.

gerous to human life unless certain precautions are taken, and who realizes or should realize that the user will not in the exercise of reasonable vigilance recognize the danger, is under a duty to warn the user of such consequences and to advise proper precautions." *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F. 2d 292, 299 (3d Cir. 1961) (applying Pennsylvania law); *Maize v. Atlantic Ref. Co.*, 352 Pa. 51 (1945); RESTATEMENT, TORTS § 388 (1934).[4] See also, *Roberts v. United States*, 316 F. 2d 489 (3d Cir. 1963).

Plaintiff's experts testified that molasses ferments and exudes carbon dioxide gas which can cause serious injury and even death to persons breathing it. The gas is particularly dangerous when stored in an enclosed tank similar to that used by Eastern since the gas is heavier than air and tends to accumulate at the bottom of the tank, just above the level of the molasses, and is not carried off by normal movement of air through the overhead manhole opening and the overhead vent with which this tank was fitted.

There was ample testimony in this case from which the jury could find that defendant National was a supplier of molasses and thus held to the standard of an expert (see *Guffie v. Erie Strayer Co.*, 350 F. 2d 378 (3d Cir. 1965)); that it knew or, as an expert, should have known of the dangerous properties of the product with which it was dealing. National had been in the molasses business for almost 50 years. It had numerous storage terminals throughout the country from which it supplied thousands of customers with molasses each year. Its own expert acknowledged that a company in the business of supplying molasses *would*

4. In his brief and at oral argument counsel for National argued that § 388 of the Restatement of Torts has not been adopted in Pennsylvania. It has. See, e.g., Ebbert v. Phila. Elec. Co., 330 Pa. 257 (1938); Lambert v. Richards-Kelly Constr. Co., 348 Pa. 407 (1944); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1 (1949); Ostrowski v. Crawford Door Sales Co., 207 Pa. Super. 424 (1966).

know that molasses, under appropriate circumstances, will ferment and give off poisonous carbon dioxide gas. Finally, there was testimony from plaintiff's experts that information concerning the specific properties of molasses was readily available from a number of sources.

Under all these circumstances it was for the jury to say whether National's failure to warn[5] Eastern of the dangers inherent in the storage of molasses constituted negligence. National contends that it was justified in assuming that whatever dangers may have attended the storage of molasses would be equally apparent to Eastern and, therefore, it was not necessary for National to give any warning. This, too, was a question for the jury. There was evidence that Eastern's employees were unaware of the danger of production of carbon dioxide from fermentation of molasses. There was testimony by Dr. Aaronson, a pathologist, that this dangerous property of molasses is not generally known. The jury could therefore conclude that National had no reason to believe that those it knew would come in contact with its product would be aware of the danger of handling it.

2. Superceding Cause.

Assuming arguendo that it was negligent in its failure to warn its customers of the hazards of molasses, National maintains that it is nevertheless entitled to judgment n.o.v. since its conduct was not the proximate cause of decedent's death. It argues that its own negligence was superceded by the negligence of Kline's employer who, National contends, should have been aware, not only of the risks involved in the cleaning of a molasses storage tank, but also of proper emergency procedures to be followed in case of an accident. In short, it contends that were it not for Eastern's negli-

5. National made no attempt to prove that it had issued any warnings or advised any precautions concerning the product which it was supplying. Its position throughout was that no warning was necessary.

gence, Kline would not have lost his life in the attempt to rescue Holtzapple.

The doctrine of superceding cause in which National's argument finds root provides as follows:

> "Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. *Where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable,* the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties." *Kline v. Moyer & Albert,* 325 Pa. 357, 364 (1937).

In the instant case, Eastern was no doubt negligent and the jury so found. The evidence supports a finding that Eastern's negligence consisted of the failure to take reasonable precautions for the safety of others after Holtzapple collapsed, and perhaps the evidence also supports a finding that Eastern was negligent in failing to learn what, with reasonable diligence, it should have found out about the properties of molasses. But there is *no* evidence that Eastern *actually knew* of the danger created by National's misconduct prior to its own independent acts of negligence. Without evidence on the crucial element of prior knowledge on the part of Eastern, the question of superceding cause was not a proper one for submission to the jury. *Rodgers v. Yellow Cab Co.,* 395 Pa. 412 (1959); *Shimer v. Bangor Gas Co.,* 410 Pa. 92 (1963); *See Eldredge, Culpable Intervention as Superceding Cause,* 86 U. Pa. L. Rev. 121, 126-35 (1937).

3. Assumption of Risk and Contributory Negligence.

Defendant's final argument on its motion for judgment n.o.v. is that the issues of assumption of the risk and contributory negligence, which were submitted to the jury, should have been decided adversely to plaintiff as a matter of law. There is no merit in this contention.

It is well established that one who is injured or killed in an attempt to effect a rescue under emergency conditions is usually entitled to a jury determination as to whether or not he was guilty of assumption of the risk or contributory negligence. *Corbin v. Phila.*, 195 Pa. 461 (1900); *Toner v. Pa. R. R. Co.*, 263 Pa. 438 (1919); *DeGregorio v. Malloy*, 356 Pa. 511 (1947); *Guca v. Pittsburgh Rys. Co.*, 367 Pa. 579 (1951). See RESTATEMENT (SECOND), TORTS § 496 (1965). There was nothing in the instant case to justify a departure from that rule. Defendant's reliance on *Valente v. Lindner*, 340 Pa. 508 (1941), is misplaced since ". . . [i]n that case [contrary to this one] there was not shown to have been an emergency." *DeGregorio v. Malloy, supra*, p. 516.

The motion for judgment n.o.v. will be denied.

B. *Motion for New Trial.*

At the time of his death, Richard C. Kline was married and had a seven-month-old child; eight months later a second child was born. In the three years immediately after her husband's death, Mrs. Kline was twice remarried. The children are now supported, at least in part, by her third husband.

1. Evidence of Widow's Remarriage.

At trial, defendant National sought to bring the fact of remarriage to the attention of the jury to mitigate the damages it might be required to pay. It alleges that the court's refusal to allow it to do so was error. While there

are no Pennsylvania cases precisely on point,[6] it seems to be almost universally accepted that evidence of the type National sought to put before the jury in the instant case is inadmissible either because it contravenes the well accepted rule that rights under the Wrongful Death and Survival Acts are fixed at the time of death, or because it is irrelevant to the issues being tried. *Johns v. Balt. & Ohio R. R. Co.*, 143 F. Supp. 15 (W. D. Pa. 1956), *aff'd per curiam*, 239 F. 2d 385 (3d Cir. 1957); *Reynolds v. Willis*, 209 A. 2d 760 (Del. 1965); *Bunda v. Hardwick*, 138 N. W. 2d 305 (Mich. 1965). To the contrary is *Jensen v. Heritage Mutual Ins. Co.*, 127 N. W. 2d 228 (Wisc. 1964). The strength of the holding in *Jensen* is questionable inasmuch as it relied in part upon *Sipes v. Mich. Cent. R. R. Co.*, 204 N. W. 84 (Mich. 1925), which has been recently overruled. See *Bunda v. Hardwick, supra.* Evidence of Mrs. Kline's remarriage was properly excluded.

2. Improper Conduct of Trial Judge.

Defendant's next point is difficult to categorize. Its counsel has not directly accused the court of bias and prejudice, and he has not proceeded by affidavit under 28 U. S. C. A. § 144 to disqualify for bias and prejudice, but he has, in the most general terms, accused the court of being something less than impartial, of "creating an attitude of sympathy" for the widow and children and an "attitude of hostility" against the defendant National and its counsel. He has pointed to nothing in particular in the record, he has instead made a general charge, in his brief, that the court made "caustic comments" and participated too much in the questioning of witnesses. At oral argument, he added that the court, during the course of the

6. It should be noted that in Philpott v. Pa. R. R. Co., 175 Pa. Pa. 570 (1896), the defendant had requested the court below to charge that the jury could take into account the fact that plaintiff had remarried after her husband's death. The point was refused. After a verdict for the plaintiff, defendant appealed and the judgment was affirmed, no mention being made of the disputed point.

trial, by a grimace or a look of annoyance here, and a sharp word there, exhibited an attitude of hostility toward defendant's counsel. Since no mention was made by counsel at the time of the alleged occurrences, and since no statements were made by him on the record at any time to indicate the particular point during the trial at which these alleged incidents occurred, it is most difficult, if not impossible, to come to grips with and to answer such charges. Counsel's explanation of his failure to note of record the alleged incidents at the time they occurred, i.e., to avoid incurring the court's displeasure, is not worthy of an attorney of his unquestioned courage and experience at the bar. A more reasonable explanation for counsel's failure is that he was more disappointed with the size of the verdict than with the conduct of the trial judge. I am not persuaded that the size of this verdict was attributable in any degree to the court's attitude or demeanor and reject this as a ground for new trial.

3. Excessiveness of Verdict.

Finally, defendant argues that the jury's verdict in the instant case was excessive[7] and should be set aside. Mindful of the admonition that "[a] court should not set aside a verdict on the ground that it is excessive unless it is so high as to shock the conscience," *Foresman v. Pepin*, 71 F. Supp. 772, 775 (E. D. Pa. 1946), *aff'd per curiam*, 161 F. 2d 872 (3d Cir. 1947), I am nevertheless constrained to agree that the total of this verdict is demonstrably excessive.

Richard C. Kline, died in August of 1960. At that time he was being paid a salary of $90 per week and $10 per week

7. As a corollary to its position that the jury's award of damages in the instant case was excessive, National contends that it was error for the court to refuse to charge the jury that any award it might make should take into account federal income taxes. There is no substance to this argument. Girard Trust Corn Exchange Bank v. P. T. C., 410 Pa. 530 (1963).

for expenses. He spent approximately $3 to $5 weekly on himself. There was testimony, uncontradicted, that had Kline been still working at Eastern at the time of trial, some 5¼ years after the accident, he would have been earning between $8,000 and $10,000 per year and that ultimately he would have earned twice that much with the company.

In addition to the evidence on salary and future earnings, there was other testimony concerning the character, determination, ability and leadership potential of Kline from which I can only conclude that he must have indeed been a rare human being. Finally, there was testimony that the decedent Kline was in excellent health and came from a family where longevity was the rule.

Even assuming an average loss under the Wrongful Death and the Survival Acts (after deduction for maintenance) of $7,250 per year for the 5¼ year period between the date of death and the date of trial, those losses, together with the funeral bill of $1,200, would total approximately $39,250, leaving approximately $340,000 of the awards attributable to future losses.[8] It is obvious that the interest alone on this lump sum, computed at 6% as required by Pennsylvania law (*Murray v. P. T. C.*, 359 Pa. 69 (1948); *Gregorius v. Safeway Steel Scaffolds Co.*, 409 Pa. 578 (1963)) would produce a return of more than the $20,000 a year which the evidence established as the peak of Kline's future earning potential. And this, of course, makes no allowance for Kline's own maintenance, or for the periodic escalation of his earnings until the achievement of his peak potential, or for the exhaustion of the principal of the fund. It is clear, therefore, that the total of the awards here were excessive. In my view, taking into account the foregoing factors, and viewing the evidence in the light most favorable to the plaintiff, an award for future losses under the Wrongful Death and the Survival Acts in the total amount of $261,500 is supportable. This, together with the $39,250

8. There was no claim for damages for pain and suffering.

earlier referred to as a supportable award for losses to the date of trial, would result in a total award of $300,750. Unless, therefore,, the plaintiff files a remittitur of the amounts in excess of $300,750 within thirty days from the date hereof, a new trial will be awarded limited to damages only. The remittitur should be apportioned to the Wrongful Death and the Survival actions in the same proportions as the amounts awarded by the jury's verdict bear to the whole.

ORDER.

AND Now, this 17th day of June, 1966, upon consideration of the Motions of National Molasses Company, it is ORDERED

1. The Motion to Set Aside Directed Verdicts in Favor of Highland Tank & Manufacturing Company and P. W. Moyer, individually and as the surviving partner of F. M. & P. W. Moyer, is DENIED;

2. The Motion for Judgment N.O.V. is DENIED; and

3. The Motion for New Trial is DENIED, provided plaintiff shall, within thirty (30) days from the date hereof, file a remittitur of the amounts of the awards in excess of $300,750. Upon failure to file such remittitur within the time specified, the Motion for New Trial is GRANTED, limited to damages only.

s/ ALFRED L. LUONGO, *J.*

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed February 24, 1967)

Argued December 21, 1966

Before: BIGGS, HASTIE and SEITZ, *Circuit Judges.*

By HASTIE, *Circuit Judge.*

National Molasses Co., one of the defendants in a diversity action under the Pennsylvania Wrongful Death and Survival Acts, is here appealing from a $300,000 judgment.

The decedent, Richard Kline, was an employee of third-party defendant Eastern States Farmers Exchange, a cooperative which sold various commodities, including black strap molasses, to farmers for agricultural use. For a number of years Eastern had bought its stock of molasses from National, a large importer and nationwide wholesale distributor of black strap molasses. To store molasses thus purchased from National for resale, Eastern had constructed the tank involved in this case under the floor of one of its buildings. The evidence showed that Kline was killed by the inhalation of carbon dioxide when he entered the almost empty tank in an effort to rescue a fellow employee who had been overcome while moving about the floor of the tank in activity preliminary to cleaning it.

The original complaint was filed against National and two other concerns which had been involved in the construction or installation of the tank. The decedent's employer Eastern was brought into the action by National as a third-party defendant.

The case was tried to a jury. At the conclusion of the plaintiff's case the court denied National's motion for a directed verdict. However, it granted similar motions by the two defendants involved in the construction and in-

stallation of the tanks and they are not parties to this appeal.

The trial resulted in a jury verdict against National in the amount of $306,975 under the Wrongful Death [redacted] and $72,000 under the Survival Act. The jury also found that National was entitled to contribution from Eastern. National then moved for judgment notwithstanding the verdict in the principal action and for a new trial. The court denied these motions, but with the proviso that the plaintiff should remit the amount by which the total recovery exceeded $300,750. Such a remittitur was filed and final judgment was entered accordingly. This appeal followed.

The denial of judgment n.o.v. is our first concern. After verdict, the appellant moved for judgment in accordance with its earlier motion for a directed verdict. The trial court denied this relief on the ground that the appellant had failed to comply with the requirements of Rule 50, Federal Rules of Civil Procedure. The court added that in its view the motion must also fail on its merits.

We agree that the appellant's failure to comply with Rule 50 precluded the granting of judgment in its favor notwithstanding the verdict against it. The record shows that at the close of all the evidence the appellant failed to renew motions it had made at earlier stages of the litigation for a directed verdict. And judicial power exists under Rule 50(b) to grant judgment notwithstanding the verdict only when a motion for a directed verdict has been made at the conclusion of all the evidence and, in legal contemplation, the questions thus raised have been reserved for subsequent determination. We have repeatedly held, very recently in *Gebhardt v. Wilson Freight Forwarding Co.*, 1965, 348 F. 2d 129, 132 "that the introduction of evidence after the denial of a motion for a directed verdict constitutes a waiver of the error, if any, in the denial unless the motion is renewed at the close of all of the evidence". We adhere to that ruling.

We come now to various alleged trial errors, upon which National has based its motion for a new trial.

The plaintiff undertook to prove that the appellant, a corporation long engaged in the business of importing, storing and selling millions of gallons of molasses annually, was chargeable with knowledge that molasses in a storage tank ferments and creates carbon dioxide, a heavy suffocating gas which often accumulates in high concentration in the lower part of the air space above the molasses. Moreover, carbon dioxide is odorless and colorless and thus may present an unsuspected hazard to a person entering a molasses storage tank to clean or repair it, or for any other purpose. On the other hand, decedent's employer, Eastern, was a cooperative which handled and sold to farmers a great variety of products suitable for agricultural needs. There was evidence that neither Eastern nor its employees did in fact appreciate the risk of a deadly accumulation of carbon dioxide in its molasses storage tank and that National should have realized the likelihood that this would be the case and should have warned Eastern of the danger. National gave no such warning. At the same time it was contended that Eastern, though ignorant of dangers inherent in molasses storage, was negligent in failing to acquaint itself with those dangers, in adopting improper procedures in cleaning its tanks and in failing to provide emergency safeguards.

The jury found both National and Eastern negligent, since in addition to imposing liability on National, it returned a verdict for National against Eastern on the third-party claim for contribution.[1] However, National contends that the jury should have been instructed that National, even though negligent in not warning Eastern, would not be liable if Eastern was also negligent in not learning of the danger and in not properly safeguarding operations in and

1. The plaintiff did not sue Eastern, presumably because, under the workmen's compensation scheme, it would not be liable in a common law action for negligence causing its employee's death.

about the tank. In other words, National sought an instruction that if negligence by Eastern was a responsible cause of the accident, that negligence constituted a superseding cause and relieved National of liability.

It is true that, if Eastern had appreciated the nature and extent of the danger any warning by National would have been superfluous, and National's failure to warn would not even have been a *causa sine qua non. Cf. Green v. Independent Oil Co.*, 1964, 414 Pa. 477, 201 A. 2d 207; *Kline v. Moyer*, 1937, 325 Pa. 357, 191 Atl. 43. But there is no evidence here that Eastern had such actual knowledge. Thus, National's failure to give its regular customer Eastern the benefit of its superior knowledge could constitute one of the legally responsible causes of the present accident, even though Eastern's failure to discover the danger on its own initiative and provide safeguards may also have been such negligence as would provide a proper basis for imposing on Eastern an obligation of contribution that was enforceable in National's third-party proceeding against it. *Cf. Duckworth v. Ford Motor Co.*, 3d Cir., 1963, 320 F. 2d 130. We find no error in the court's handling of this aspect of the case.

Several additional contentions have been advanced concerning the proof and the amount of damages. The jury returned a verdict against National in the amount of $306,975 on the Wrongful Death claim and $72,200 on the Survival claim, an aggregate award of $379,175. On motion for a new trial, the court found this verdict excessive and ordered a new trial unless the plaintiff should file "a remittitur of the amounts in excess of $300,750 . . . [to] be apportioned to the Wrongful Death and Survival actions in the same proportions as the amounts awarded by the jury's verdict bear to the whole". Such a remittitur was filed and the awards now stand reduced accordingly.

The appellant's principal point in this connection seems to be that the prospective future earnings of the deceased were improperly conjectural because neither actuarial

testimony nor any table of life expectancy was introduced in evidence. However, there was evidence that the decedent's grandfathers died at the ages of 75 and 72, and his grandmothers at 72 and 68. There also was evidence of the decedent's sound health and clean and wholesome living until the mishap in suit terminated his very promising life at age 21. There also was clear and informative evidence of his past and prospective earnings. This was sufficient for a jury determination of damages. *Cf. Benson v. Altoona & L. V. E. Ry.*, 1910, 228 Pa. 290, 77 Atl. 492. After considering this evidence and the amount of the verdict the court directed remittitur as set out above. It was the court's view that the total sum awarded substantially exceeded the present value of the lifetime net earnings that could rationally be predicted for the decedent. We cannot say either that the evidence was insufficient to support the reduced award or that it required the court to permit the original verdict to stand. *Cf. Russell v. Monongahela Ry.*, 3d Cir., 1958, 262 F. 2d 349.

It is also urged on this appeal that the apportionment of the remittitur between the Wrongful Death claim and the Survival claim was arbitrary. However, it is admitted that the decedent died almost immediately and without pain or suffering. Almost all of both awards represented the jury's estimate of the present worth of probable lifetime net earnings after the subtraction of probable expenditures for personal maintenance, and the relative amounts awarded on Wrongful Death and Survival claims represented the jury's judgment of the decedent's likely allocation of that total between support for dependents and accumulations, if he had lived. The court concluded that some $80,000 of the total awards could not be justified by the evidence upon which an estimate of future net earnings had to be made. At the same time, the court respected the jury's allocation of anticipated overall net earnings between family support and accumulations by requiring that the

$80,000 reduction of the total award based upon prospective future earnings be allocated between Wrongful Death and Survival awards in the same proportion as the original jury awards on these claims bore to each other. This was logical and proper and merits appellate sanction.

Finally, National has asked us to consider whether the trial court's action in dismissing the plaintiff's action as against two other parties involved in the construction and installation of the tank was correct. But the plaintiff, the claimant against those parties in the original action, has not appealed their dismissal. And, though the record shows that National at one time cross-claimed against these co-defendants, the record also shows that all cross-claims among the defendants were voluntarily dismissed. Since no claim against either of these co-defendants has been preserved for review, National has no standing now to challenge their dismissal.

The appellant also complains of other alleged errors in trial rulings. We have examined all of these contentions and find no reversible error.

The judgment will be affirmed.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING.

Present: STALEY, *Chief Judge;* and BIGGS, MCLAUGHLIN, KALODNER, HASTIE, SMITH, FREEDMAN and SEITZ, *Circuit Judges.*

The petition for rehearing filed by NATIONAL MOLASSES COMPANY, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ WILLIAM H. HASTIE,
Judge.

Date: March 27, 1967.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT STAYING ISSUANCE OF MANDATE.

Pursuant to Rule 36(2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it is hereby stayed until May 1, 1967.

WILLIAM H. HASTIE,
Circuit Judge.

Dated: April 18, 1967.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Present: BIGGS, HASTIE and SEITZ, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 19, 1965, as reduced by judgment filed June 17, 1966, be, and the same is hereby affirmed, with costs.

ATTEST:
THOMAS F. QUINN,
Clerk.

February 24, 1967.

LETTER OF TRANSMITTAL.

DECHERT, PRICE & RHOADS
Sixteenth Floor, Three Penn Center Plaza
Philadelphia, Pa. 19102

March 15, 1965

Edward C. German, Esquire
1507 Packard Building
Philadelphia, Penna. 19102

Peter P. Liebert, 3rd, Esq.
1320 Packard Building
Philadelphia, Penna. 19102

Joseph J. Murphy, Esquire
Suite 1525
Two Penn Center Plaza
Philadelphia, Penna. 19102

Re: *Beebe v. Highland Tank & Mfg. Co., et al.*

Gentlemen:

I enclose herewith Plaintiff's Requests for Admissions directed to Highland Tank and Manufacturing Company, National Molasses Company and F. M. Moyer and P. W. Moyer. I also enclose two copies of Plaintiff's Second Amended Pre-Trial Memorandum. The originals of these papers are being filed of record.

Very truly yours,

GALEN J. WHITE, JR.
Galen J. White, Jr.

GJW:jto
Enclosures

cc: Richard J. van Roden, Esquire

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 30080.

DAVID B. BEEBE, ADMINISTRATOR OF THE ESTATE OF RICHARD C. KLINE, DECEASED,

v.

HIGHLAND TANK AND MANUFACTURING COMPANY,

AND

F. M. MOYER AND P. W. MOYER, INDIVIDUALLY AND AS CO-PARTNERS TRADING AND DOING BUSINESS AS F. M. AND P. W. MOYER,

AND

NATIONAL MOLASSES COMPANY,

v.

EASTERN STATES FARMERS EXCHANGE.

REQUESTS FOR ADMISSIONS UNDER RULE 36.

Plaintiff, DAVID B. BEEBE, Administrator of the Estate of Richard C. Kline, Deceased, requests that defendants Highland Tank and Manufacturing Company, National Molasses Company and F. M. Moyer and P. W. Moyer, individually and as co-partners trading and doing business as F. M. and P. W. Moyer, within ten (10) days of the service of these requests make the following admissions:

1. That on the date of the institution of this suit defendant Highland Tank and Manufacturing Company was a corporation incorporated under the laws of the Commonwealth of Pennsylvania and had its principal place of business at Stoystown, Somerset County, Pennsylvania, and not in New Jersey.

2. That on the date of the institution of this suit defendant National Molasses Company was a corporation incorporated under the laws of the Commonwealth of Pennsylvania, and had its principal place of business at Oreland, Montgomery County, Pennsylvania, and not in New Jersey.

3. That on the date of the institution of this suit defendant F. M. Moyer and P. W. Moyer were adult individuals residing in York, York County, Pennsylvania, and were co-partners trading and doing business as F. M. and P. W. Moyer with their principal place of business in York, York County, Pennsylvania, and not in New Jersey.

GORDON W. GERBER,
Gordon W. Gerber,
1600 Three Penn Center Plaza,
Philadelphia, Penna. 19102,
Attorney for Plaintiff.